No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALLAN R. PERVIS,

Petitioner,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER THE RIGHT OF AN ACCUSED PERSON UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION TO REMAIN SILENT PENDING A CRIMINAL PROSECUTION OBVIATES OR STAYS A CONTRACTUAL PROVISION AUTHORIZING AN INSURER UNDER A FIRE INSURANCE POLICY TO OBTAIN A STATEMENT UNDER OATH AFTER AN INDICTMENT HAS BEEN ISSUED AGAINST THE INSURED BASED UPON EVIDENCE PROVIDED TO THE DISTRICT ATTORNEY BY THE INSURER, OR WHETHER THE FAILURE TO GIVE SUCH A STATEMENT UNDER SUCH CONDITIONS RESULTS IN A FORFEITURE OF THE INSURED'S RIGHTS UNDER THE CONTRACT AS A MATTER OF LAW.

LIST OF PARTIES

Parties

Allan R. Pervis
State Farm Fire and Casualty Company

Attorneys

Robert C. Koski
Austin E. Catts
Michael H. Schroder

Organizations Representing Parties

REMLER, KAM & KOSKI
AUSTIN E. CATTS & ASSOCIATES
SWIFT, CURRY, McGHEE & HIERS

Insurance Companies

State Farm Fire and Casualty Company,
Defendant.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, Allen R. Pervis, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered May 18, 1990.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Georgia, which is not reported, is reprinted in Appendix A.

The opinion of the Court of Appeals for the Eleventh Circuit is not reported, but is reprinted in Appendix B.

The opinion of the Georgia Court of Appeals in the related criminal prosecution is reported, but for the convenience of this court is reprinted as Appendix C.

JURISDICTION

The United States District Court for the Northern District of Georgia obtained jurisdiction of this case under 28 U.S.C. Section 1332.

On May 8, 1989, the District Court, Judge Marvin Shoob presiding, entered summary judgment on behalf of the respondent. See Appendix A.

On May 18, 1990, the United States Court of Appeals for the Eleventh Circuit issued its opinion affirming the order of the trial court. See Appendix B.

Jurisdiction of the Supreme Court to review the judgment of the Eleventh Circuit exists under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution, U.S. Const. Amend. IV, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due

> process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment of the United States Constitution, U.S. Const., Amend. XIV, Section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

PROCEDURAL BACKGROUND

On July 19, 1985, the Petitioner's residence, which also served as his place of business, burned to the ground.

On July 21, 1985, Petitioner met with Andy Malcolm, a claims specialist with Respondent State Farm, to respond to an interrogation that was recorded and at the conclusion of which the truthfulness of the Petitioner's testimony was attested to. On July 29, 1985, State Farm assigned its investigator, Mr. Richard Wallace, to investigate the fire. On August 2, 1985, State Farm sent a notice to the State Fire Marshal's office which included an agreement to supply all information in State Farm's files and to cooperate with government investigators. At approximately this time, State Farm investigators made similar contacts with the Lumpkin County Sheriff's office. On August 7, 1985, the Petitioner appeared

at a recorded interrogation held by State Farm's investigator, Mr. Wallace, answered all questions put to him at that time, and stated on the record that all statements made in the interrogation were true and correct to the best of his knowledge. After concluding the recorded interrogation, Mr. Wallace, the Respondent's investigator, stated to the Petitioner to the effect that "I am going to see you in prison, because I know you burned the house."

On August 7, 1985, the Petitioner submitted to the Respondent a prepared inventory list and sworn statement as proof of loss covered by the Respondent. While investigating the claim, the inspector employed by State Farm contacted the authorities in Dahlonega, Georgia, and provided information that led to the filing of a criminal complaint against the Petitioner alleging arson in relation to the property subject to the claim.

On August 28, 1985, a Grand Jury indictment was handed down against the Petitioner.

On August 28, 1985, State Farm demanded that the Petitioner submit to a depostition under oath, a copy of which demand is attached hereto as Appendix E, to which the Petitioner refused, asserting his Fifth Amendment rights.

On September 11, 1985, pursuant to the August 28, 1985, notice, counsel for the Respondent State Farm appeared at the place designated for the purpose of conducting an interrogation under oath not limited in any manner as to scope. Mr. Pervis's exercise of his Fifth Amendment rights in refusing to testify at that time or immediately thereafter formed the basis for the trial court's grant of summary judgment in this action on behalf of State Farm.

After a request by the Petitioner's counsel, State Farm refused to voluntarily provide access to this physical evidence to Petitioner Pervis, and forced Pervis to file a motion to compel production with the criminal trial court, which motion was denied prior to trial.

On February 27, 1986, a trial was held in Lumpkin County on the criminal charges then pending against the Petitioner. State Farm's investigator, Mr. Wallace, was a listed and subpoenaed witness for the State.

On March 7, 1986, the Petitioner was convicted by a Lumpkin County Jury of Arson.

On July 17, 1986, the Petitioner filed this lawsuit seeking to recover under the insurance policy.

On January 8, 1987, the Court of Appeals of Georgia reversed the Petitioner's conviction on the ground that he was denied due process as a result of the trial court's failure to order State Farm, Respondent herein, to provide the Petitioner with the opportunity to inspect and test the purported evidence that was presented by State Farm to the Sheriff of Lumpkin County and used to form the basis of the original allegation of criminal conduct. State Farm refused to provide the opportunity to inspect these items to the Petitioner voluntarily at that time or prior to the time of trial.

On May 8, 1989, the District Court, Judge Marvin Shoob presiding, entered summary judgment on behalf of State Farm on the grounds that the exercise by the Petitioner of his Fifth Amendment rights constituted a breach of the

insurance contract, and entitled State Farm to judgment as a matter of law.

On May 18, 1990, the United States Court of Appeals for the Eleventh Circuit issued its opinion affirming the order of the trial court.

STATEMENT OF FACTS

Prior to July 17, 1985, the Petitioner operated a business out of the basement of his home. On that date, his home burned to the ground, and thereafter he filed appropriate papers making a claim under his fire insurance policy with the Respondent.

In investigating the circumstances of the fire, the Respondent obtained two recorded statements, and took certain samples of the ashes for chemical analysis, the results of which were presented to the District Attorney's Office of Lumpkin County, Georgia, which presented the evidence to a Grand Jury, which handed down an indictment of the Petitioner on August 28, 1985.

On that same date, the Respondent demanded a sworn deposition of the Petitioner before a court reporter pursuant to its insurance policy. Through counsel, the Petitioner refused, claiming privilege under the Fifth Amendment.

Later, in preparation for the criminal trial, the Petitioner requested access to the alleged evidence provided to the District Attorney. The Respondent refused such access and, after motion, the trial court refused to order the Respondent to make it available to the Petitioner. He was convicted on March 7, 1986, but the conviction was reversed by the Georgia Court of Appeals due to the fundamental

unfairness of the trial court's failure to provide the Petitioner with access to the same information provided to the District Attorney by the Respondent insurance company. The opinion of the Georgia Court of Appeals is attached hereto as Appendix C.

The Petitioner by this action is seeking to recover the proceeds of the insurance policy covering his burned home.

STANDARD AND SCOPE OF REVIEW

The standard for the scope of review of the District Court's grant of Summary Judgment in favor of the Respondent is whether based on all the evidence "there is no genuine issue as to any material fact and that the moving [party is] entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In order to make such a determination, the district court must view the evidence in a light most favorable to the non-movant. *Osterneck v. E.T. Barwick Industries, Inc.*, 79 F.R.D. 47 (N.D. Ga. 1979).

The standard itself is whether the evidence is sufficient to create an issue of fact for the jury. In determining whether the evidence is sufficient, the District Court is not free to weigh the evidence, to pass on the credibility of the witnesses, or to substitute its judgment of the facts for that of the jury. *Alman Bros. Farms & Feed Mill, Inc. v. Diamond Lab, Inc.*, 437 F.2d 1295 (5th Cir. 1971). Additionally, the evidence must be viewed in the light most favorable to the party answering the motions made and must give that party the benefit of all reasonable inferences from the evidence. *Id.*

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT BELOW IMPOSING AN OBLIGATION ON THE PETITIONER TO WAIVE HIS RIGHT TO REMAIN SILENT DURING THE PENDENCY OF A CRIMINAL PROCEEDING OR SUFFER A FORFEITURE OF CIVIL PROPERTY RIGHTS IS IN CONFLICT WITH THE PRINCIPLES OF THE FIFTH AMENDMENT, AND IN CONFLICT WITH THE DECISIONS OF THIS COURT.

The object of the Fifth Amendment privilege against self-incrimination is to ensure that a person shall not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself committed the crime. *Lefkowitz v. Turley*, 414 U.S. 70; 38 L. Ed. 2d 274; 94 S. Ct. 316 (1973).

The decision of the Eleventh Circuit in this case creates a duty compelling any person with a contract of fire insurance to choose between his Fifth Amendment privilege against self-incrimination and his rights under the policy. In the initial stages of a fire investigation, it does not seem unreasonable for the insured to be required to give a statement to his insurer. This was in fact done twice in the circumstances leading up to this case. However, the insurer in this case went further by actively participating in a criminal prosecution of its insured by seeking to help the prosecutor while at the same time hindering access by its insured to the same evidence. This placed the insurer in the position of a private prosecutor, which is even more clearly established by the Respondent's agreement to provide all information in its possession to the District Attorney's office. The ultimate unfairness of this situation crystallizes with the

Respondent's decision to demand a deposition under oath the very day an indictment was obtained through its joint efforts with the District Attorney's office, coupled with the economic interest of the Respondent in the conviction of the Petitioner, which would constitute an adverse judgment via collateral estoppel of the Petitioner's rights to the proceeds of his policy of fire insurance.

The grant of summary judgment in a civil trial merely because of the invocation of the Fifth Amendment would unduly penalize the exercise of the privilege, so as to violate the accused's due process rights. *United States v. White*, 589 F 2d 1283 (1979). This is the result that was achieved in this case.

State Farm Fire and Casualty Company investigators came to an early (and self-serving) conclusion that the fire that caused the damage subject to the pending claim was the result of arson, and that the Petitioner was the person responsible for that act of arson. Communication of that belief, coupled with an agreement to assist in the prosecution of the Petitioner, was given to the State three days after assignment of investigator Wallace to the case.

The State could not require a statement of any kind from Mr. Pervis prior to his trial. Where a person is under indictment, the State does not have authority to compel that person to testify in any manner. *United States v. Wade*, 388 U.S. 218; 18 L. Ed. 2d 1149; 87 S. Ct. 1926 (1967).

Although it is true that State Farm is not a direct instrumentality of the State, in this case State Farm allied itself with the interests of the prosecution to the point of rendering aid to the State, while at the same time denying access to

information in its possession from the Petitioner. Under Georgia law, State Farm did have the contractual right to obtain testimony from the Petitioner, its insured. *Halcome v. Cincinnati Insurance Company*, 254 Ga. 742 (1985). Pursuant to this right, the Respondent obtained two recorded interrogations and statements with two separate insurance investigators prior to its demand for a deposition under oath, which indeed was not sought until after a grand jury indictment was handed down against the Petitioner with the Respondent's active participation.

These developments greatly altered the parties' respective interests in this case. Prior to the indictment, Mr. Pervis was properly seeking to protect a property right of substantial value. Afterwards, he was fighting for his liberty. The Respondent had thus placed him in a terrible quandary. He was required to chose between prejudicing his criminal defense by waiving his Fifth Amendment rights, or prejudicing his claim under his insurance policy by exercising them. This quandary was not a mere coincidence, but was in fact procured by his contractual inquisitor, the Respondent herein. The Petitioner was made to clearly understand that he would risk forfeiture of his claim if he did not testify, but that any testimony he gave could and would be used against him.

II. MR. PERVIS'S FIFTH AMENDMENT AND DUE PROCESS RIGHTS EXCUSE HIS FAILURE TO GIVE SWORN TESTIMONY IN THIS CASE UNTIL AFTER THE CONCLUSION OF THE CRIMINAL PROSECUTIONS.

A criminal Defendant has an absolute right to not give any testimony to State investigators while a criminal action is pending. *United States v. Wade*, 388 U.S. 218; 18 L. Ed. 2d 1149; 87 S. Ct. 1926 (1967). The imposition of a forfeiture of substantial civil penalties as a condition of the exercise of this right is a violation of both public policy and due process.

The principal case in Georgia on the issue of waiver of rights under an insurance policy for refusal to give testimony is *Halcome v. Cincinnati Insurance Co.*, 254 Ga. 742 (1985). This case was certified to the Georgia Supreme Court by this court in a case where the Plaintiffs alleged a car was stolen containing in excess of $100,000 worth of jewelry. At a sworn examination, the Plaintiffs refused to answer certain questions that the Defendant alleged were germane to the issue of fraud. The court held that a breach occurs in such a context "unless some principle excuses the failure by the Halcomes to furnish the information." *Id.* at 744.

This principle was recently applied by the Eleventh Circuit in the case of *Scott v. Board of Commissioners*, 815 F.2d 653 (11th Cir. 1987) to hold that even factual issues can constitute a principle excusing refusal to provide certain information.

The prior United States Circuit Court of Appeals covering the State of Georgia has already considered the exact

question posed by this case, and indicated a position favorable to the Petitioner. In the case of *United States v. White*, 589 F. 2d 1283 (5th Cir. 1979), the court was confronted with a case remarkably similar factually to the one at bar, but in which the Defendant in the criminal case elected to give the sworn statement without being compelled by the civil court to do so. In the appeal of his later conviction in the criminal case, the court found that since the Defendant was not compelled to give the testimony in the civil case, and there was "no indication that invocation of the fifth amendment in this case would have resulted in an adverse judgment . . . Since there is no forfeiture of any property or benefit, we can see no impermissible effect on Keno's fifth amendment privilege in the present case." *Id.* at 1287. However, the court further stated:

> "As an initial matter, we accept the proposition that a grant of summary judgment merely because of the invocation of the fifth amendment would unduly penalize the employment of the privilege." *Id.* at 1287.

In the instant case, invocation of the Fifth Amendment has indeed resulted per se in the entry of summary judgment, and the complete forfeiture of all the Petitioner's rights under the insurance contract.

No argument can be made that the Fifth Amendment is not a principle of law. Under *Halcome*, the grant of summary judgment indicates that the trial court did not consider that this principle, fundamental to our due process rights in a criminal accusation, justifies refusal to give testimony after an indictment is handed down and the claimant is on trial for his liberty. The implausibility of this position becomes a

great deal more clear when the principle is applied to the facts of this case. State Farm actively sought the indictment before seeking the sworn statement. The sworn statement was demanded the very date that the indictment was delivered. Further, the conviction resulting from this prosecution was overturned as a direct result of the prosecutorial conduct of the Respondent that prejudiced the Petitioner's opportunity for a fair trial.

In *Pervis v. State*, 181 Ga. App. 613 (1987), physical evidence taken from the scene of the crime was given by the State's representatives to State Farm for testing at their laboratories. When Mr. Pervis sought to examine this material, the State refused on the ground that it was in the possession of State Farm. The court did not order its production by State Farm. State Farm refused to give access to this evidence to Mr. Pervis voluntarily, and indeed, State Farm had a vested interest in making Mr. Pervis's defense as ineffective as possible. The evidence remained with State Farm ". . . until the time of trial, when it was introduced into evidence by the State." *Id.* at 615.

It is quite clear from the record of both this case and the criminal case that State Farm had an interest in securing the conviction of the Petitioner, and used every artifice within its power to assist in obtaining that result. Recognizing this process, the Petitioner refused to give State Farm any further ammunition to be used against him by exercising his Fifth Amendment rights. As a result of the Petitioner's exercise of his constitutional rights, the trial court has ordered a forfeiture of his economic rights under the insurance contract. Neither *Halcome* and its progeny, nor the concept

of due process embodied in the United States Constitution, support this result. The trial court must be reversed.

III. THE DEPOSITION UNDER OATH DEMANDED BY RESPONDENT STATE FARM INSURANCE COMPANY WAS NOT "REASONABLY REQUIRED" UNDER THE POLICY NOR NECESSARY FOR ANY PURPOSE OTHER THAN USING THE CRIMINAL PROSECUTION AS A TOOL TO AVOID LIABILITY UNDER THE INSURANCE POLICY.

The acknowledged purpose of the contractual provision in the insurance policy at bar is to allow insurance companies to investigate suspicious fires for the purpose of determining the extent of their liability, and investigating the possibility of arson or other circumstances that might mitigate their liability.

The contractual provision in the policy at bar states as follows:

> 2. In case of a loss to which this insurance may apply, you shall see that the following duties are performed:
>
> (d) as often as we reasonably require:
>
> (3) Submit to examinations under oath and subscribe to same.

See Appendix D at 2(d)(3).

In the instant case, the petitioner provided two statements, affirmed under oath, that were recorded and eventually transcribed by the Respondent. Subscription under oath by

the Petitioner as to these statements by the Petitioner could have been requested at any time, but was not.

Instead, the Respondent completed an investigation in cooperation with the Lumpkin County Georgia District Attorney's office that was sufficient to generate an indictment for arson of the Petitioner. In fact, the Respondent, in the letter demanding the sworn statement, directly indicates that it has already come to the conclusion that the fire was caused by arson. See Appendix E. Finally, the demand for a deposition under oath was not made until the day the Petitioner was indicted. This is a coincidence that is not indicative of good faith in the Respondent.

Under the policy provision at bar, the question is whether the deposition under oath of the Petitioner was "reasonably require[d]." The Respondent's correspondence indicates that the Respondent had already determined that the fire was caused by arson, and the Respondent's conduct in cooperation with the Lumpkin County District Attorney indicates that it had further concluded that the Petitioner was the perpetrator. Thus the Respondent's investigation was clearly reasonably complete for the purpose of evaluating the claim, and this further examination was directed at obtaining a conviction of the Petitioner, and thus avoiding liability under the policy. Finally, the Respondent's conduct prior to trial in withholding evidence from the Petitioner and depriving him of a fair trial in the criminal prosecution indicates that the Respondent's bad faith purpose was active and ongoing.

The contractual provision at bar is intended to serve as a defensive tool by insurance companies that assists them in learning information necessary to make reasonable

decisions as to their legal liability. Once those decisions are made, further use of the tool is not reasonably required under the policy. In this case, Respondent State Farm determined a means of using this provision offensively as a weapon to deprive the Petitioner of the benefits of his insurance policy, and as a tool to deprive him of a substantial portion of his criminal defense. The use of the federal and state courts to manipulate the Petitioner into deprivation of his Fifth Amendment rights in violation of the due process clauses of both the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

The Fifth Amendment of the United States Constitution provides for a right against self-incrimination to a person accused of a crime. The Respondent in this action has abused this Constitutional privilege through the use of a contractual provision to foreclose the Petitioner's rights under his policy of fire insurance by forcing either the election to exercise the privilege and breach the contract, or the handicapping of the criminal defense through the waiver of the privilege, with a forfeiture of those rights in the event of a conviction.

The use of the criminal courts to obtain this kind of an advantage in a civil case is repugnant to the principles stated in the Fifth and Fourteenth Amendments to the United States Constitution.

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to review the decision of the Eleventh Circuit in this case.

Respectfully submitted,

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August 16, 1990

Appendix A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ALLAN R. PERVIS, JR.,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	1:86-CV-1563-MHS
STATE FARM FIRE AND	:	
CASUALTY COMPANY,	:	
Defendant	:	

ORDER

Plaintiff Allan R. Pervis, Jr. ("Pervis") seeks $370,000 in compensatory damages, along with punitive damages and attorney's fees, in this suit for recovery under a homeowner's insurance policy issued by defendant State Farm Fire and Casualty Company ("State Farm"). The Court deferred ruling on all pending motions and subsequently stayed the matter pending resolution of a related criminal case in the Superior Court of Lumpkin County. *See* Orders dated July 17, 1987 and November 23, 1987. The Court lifted the stay by an order dated January 31, 1989 and, for the reasons stated below, the Court will now grant defendant's motion for summary judgment, which was filed prior to the stay.

This dispute derives from a fire on July 19, 1985 that destroyed plaintiff's residence. Plaintiff filed suit after State Farm refused to honor plaintiff's claim for proceeds under

his State Farm homeowner's policy. In its answer, State Farm asserted that Pervis could not recover under the policy because he failed to submit to an examination under oath as required by the policy. State Farm also maintained that Pervis could not recover under the policy because he either set the fire or arranged to have someone else set the fire.[1] Plaintiff's failure to submit to an examination under oath is the basis for the pending motion for summary judgment.

Under the policy State Farm issued to Pervis, the insured must comply with a number of conditions in the event of a loss. Most of the requirements relate to notice and proof of loss, as well as cooperation by the insured during efforts to investigate the loss. Among the specific conditions are two provisions that govern the present controversy. First, the policy states that the insured must "submit to examinations under oath" as often as reasonably required by State Farm. Defendant's Motion for Summary Judgment, Exhibit A, at 9. Second, the policy provides that "no action shall be brought unless there has been compliance with the policy provisions." Defendant's Motion for Summary Judgment, Exhibit A, at 11. State Farm claims that it is entitled to summary judgment as a matter of law, because plaintiff breached these conditions of the policy when he refused to submit to an examination under oath.

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[1] Based on this incident, Pervis was found guilty of arson by the Superior Court of Lumpkin County. His conviction was reversed on appeal, however, because the trial court denied his motion to inspect, examine and test physical evidence removed from the site. *Pervis v. The State*, 181 Ga. App. 613 (1987). A new trial has not been scheduled.

Pervis presents two arguments in response to defendant's motion for summary judgment. First, Pervis maintains that the requirement that he submit to an examination under oath violated his Fifth Amendment right against self-incrimination, because his statements might be used against him during his criminal trial in the Superior Court of Lumpkin County. Second, Pervis claims that his obligations under the policy were discharged when he gave statements to defendant's investigators prior to their request for an examination under oath or when he testified at a deposition in connection with this lawsuit.

At the outset, the Court notes that under Georgia law plaintiff would have breached his contract with defendant if he failed to provide *any* materiai information during an examination under oath. *Halcome v. Cincinnati Insurance Company*, 254 Ga. 742 (1985). The breach involved here is much greater, however, since plaintiff completely refused to submit to an examination under oath. The Court rejects plaintiff's argument that prior statements to investigators or subsequent testimony at a deposition satisfy the examination under oath requirement. No matter how much information plaintiff conveyed to defendant's investigators, the policy entitled State Farm to insist upon an examination under oath. In addition, plaintiff's testimony at a deposition after he filed suit could not discharge his duties under the policy in view of the policy's "no action" clause.

Based on *Halcome* plaintiff can only proceed with this action if his refusal to submit to an examination under oath is excused by some principle. Plaintiff maintains that his Fifth Amendment privilege constitutes such a principle, which precludes summary judgment because under *Blackburn v. State Farm Fire and Casualty Company*, 174 Ga.

App. 157 (1985), "the sufficiency of the excuse offered . . . [is] generally [a question] of fact, to be determined by the jury." *Id.* at 159 (*quoting Buffalo Insurance Company v. Steinberg*, 105 Ga. App. 366, 371 (1962)). Unlike plaintiff, however, the Court does not believe that the availability of Fifth Amendment privilege is a question of fact for the jury.[2]

The Court holds that the Fifth Amendment privilege against self-incrimination does not excuse plaintiff's refusal to submit to an examination under oath. Although Georgia courts have not addressed this issue, courts in other jurisdictions have reached the same conclusion. As the court stated under similar facts in *Kisting v. Westchester Fire Insurance Company*, 290 F. Supp. 141 (W.D. Wis. 1968), *aff'd*, 416 F. 2d 967 (7th Cir. 1969), plaintiff "seek[s] to utilize the privilege not only as a shield, but also as a sword. This [he] cannot do." *Kisting*, 290 F. Supp. at 149.[3] The requirement of examinations under oath serves the important role of protecting insurance companies against fraudulent claims. The Court will not undermine this principle by holding that, in particularly suspicious cases, the insured can avoid

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[2] Plaintiff's reliance on *Blackburn* is misplaced because the plaintiff in *Blackburn* claimed he could not submit to an examination under oath prior to filing suit for medical reasons. Under some circumstances, medical disabilities excuse the failure to comply with a condition precedent to coverage. Plaintiff cites no authority, however, to support his argument that his Fifth Amendment privilege constitutes a similar excuse.

[3] The *Kisting* court observed that "[a] plaintiff in a civil action who exercises his privilege against self-incrimination to refuse to answer questions pertinent to the issues involved will have his complaint dismissed upon timely motion." *Kisting*, 290 F. Supp. at 149 (citations omitted). The Court agrees that the same rationale applies in this case. Plaintiff has not been forced to testify at his peril; the decisions to file a claim and to pursue this lawsuit were entirely his own.

examination by asserting the privilege against self-incrimination.

For the foregoing reasons, the Court GRANTS defendant's motion for summary judgment and DIRECTS the Clerk to enter judgment accordingly.

It is so ordered, this 5th day of May, 1989.

/s/ Marvin H. Shoob
Marvin H. Shoob, Judge
United States District Court
Northern District of Georgia

Appendix B

Allan R. PERVIS, Jr.,
Plaintiff-Appellant,

v.

STATE FARM FIRE AND CASUALTY COMPANY, Defendant-Appellee.

No. 89-8401.

United States Court of Appeals,
Eleventh Circuit.

May 18, 1990.

Appeal from the United States District Court for the Northern District of Georgia.

Before TJOFLAT, Chief Judge, TUTTLE and RONEY[1], Senior Circuit Judges.

TUTTLE, Senior Circuit Judge:

This is an appeal by plaintiff Allan R. Pervis, Jr. (Pervis) from the district court's grant of summary judgment in favor of defendant State Farm Fire and Casualty Co. (State Farm) in plaintiff's action to recover fire insurance proceeds.

I. STATEMENT OF THE CASE

In July 1986, Pervis instituted this diversity action against State Farm to recover under a homeowner's insur-

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[1] *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

ance policy issued by State Farm. Plaintiff had filed a claim for damage to his residence, which was also his place of business, caused by a fire occurring July 19, 1985. When defendant refused to honor the claim, plaintiff filed this suit seeking $370,000 plus attorney's fees and punitive damages.

Among the numerous defenses State Farm asserted in its answer, the one at issue here is that Pervis failed to submit to an examination under oath, which is required by the insurance policy and is a condition precedent to the insured's commencement of an action against the insurer. Defendant filed a motion for summary judgment based on that defense. The district court stayed the motion pending resolution of criminal proceedings brought against plaintiff in the Superior Court of Lumpkin County, Georgia before plaintiff commenced this action. On March 7, 1986, plaintiff had been found guilty of arson; the conviction was reversed on appeal on January 8, 1987, because the trial court erroneously denied Pervis' motion to inspect and test physical evidence removed from the fire site. On May 5, 1989, the court below granted defendant's summary judgment motion.

II. STATEMENT OF FACTS

After the fire occurred on July 19, 1985, Pervis gave an oral statement to State Farm on July 21, 1985 and again on August 7, 1985. Neither was a sworn statement. On August 28, 1985, State Farm requested a sworn statement from Pervis pursuant to the policy, which provides that in case of a loss to which the insurance may apply, the insured shall, as often as the insurer reasonably requires, "submit to examination under oath and subscribe the same." The insurance contract further provides that no action shall be brought

against the insurer "unless there has been compliance with the policy provisions and the action is started within one year after the occurrence causing loss or damage."

The same day or the day after State Farm made its request, a grand jury indictment was issued charging Pervis with arson. Pervis subsequently refused State Farm's request to submit to an examination under oath on the ground that his statement could be used against him at his criminal trial.[2] Appellant submits that he gave an additional recorded statement to State Farm representatives on October 11, 1985.

III. ISSUE

In an action brought by an insured to recover insurance proceeds, does the grant of summary judgment in favor of the insurer, based on the insured's failure to comply with the requirement of his insurance policy that he submit to an examination under oath before filing such an action, violate the insured's constitutional rights, when the refusal to be examined is said to be an invocation of the insured's fifth amendment right against self-incrimination?

IV. DISCUSSION

Appellant acknowledges that an insurer has the right to investigate whether a fire for which a claim is made was caused by arson, in order to reach a decision as to whether to pay the claim. Appellant concedes that under the express

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[2] Counsel for State Farm repeated the request and informed Pervis' counsel that no decision could be made on the claim without an examination under oath. On September 11, 1985, State Farm's counsel appeared at the time and place designated to conduct an examination, but neither Pervis nor his attorney appeared.

terms of its insurance contract, State Farm had the right to compel appellant to testify. Therefore, it is clear that plaintiff's refusal to submit to the requested examination under oath constitutes a breach of the insurance contract, unless some privilege excuses plaintiff's failure to comply with the contractual condition. *Halcome v. Cincinnati Ins. Co.*, 254 Ga. 742, 744, 334 S.E.2d 155, 157 (1985); *Hines v. State Farm Fire & Casualty Co.*, 815 F.2d 648, 651 (11th Cir.1987). Appellant contends that the privilege against self-incrimination excuses him from complying with the provisions of the insurance contract.[3] He maintains that, by granting summary judgment for defendant, the district court in effect forced him to forfeit his claim for proceeds, which penalized him for exercising his fifth amendment privilege and thereby violated his due process rights.[4]

Appellant entered into a contract which required that he submit to an examination under oath as a condition precedent to suit. The contractual provision is commonly

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[3] Appellant contends in the alternative that the several recorded statements he gave to State Farm representatives satisfy his obligation to the insurer. The contract expressly requires "examinations under oath," which these were not. We therefore reject appellant's argument.

[4] Appellant also contends that State Farm sought a sworn statement only after it became aware of the pending grand jury indictment, which State Farm actively assisted prosecutors in obtaining. Appellant argues that because State Farm intentionally placed him in this quandary, he should be excused from complying with State Farm's request. Appellee maintains, however, that it did not know about the indictment before it made its request, and that it was required by Georgia law to cooperate with law enforcement officials in the case of a suspicious fire loss. O.C.G.A. § 25-2-33(b). Whether or not State Farm knew of and cooperated with the prosecution of Pervis, appellee was entitled under the contract to seek a sworn statement and appellant is not excused for this reason.

used in insurance policies and has been upheld by many courts. *See, e.g., Halcome, supra.* We agree with the district court's determination that the fifth amendment privilege against self-incrimination does not in this case excuse appellant from fulfilling his contractual obligation. The district court cited *Kisting v. Westchester Fire Ins. Co.*, 290 F.Supp. 141 (W.D.Wis.1968), *aff'd*, 416 F.2d 967 (7th Cir.1969), which involved facts similar to the ones presented here. In *Kisting*, the plaintiff refused to answer questions posed by the insurance company concerning income tax returns, which were material and related to defendant's affirmative defense of arson. The refusal to answer was based upon a fifth amendment privilege against self-incrimination. The court held that recovery was barred because the plaintiff sought "to utilize the privilege not only as a shield, but also as a sword." 290 F.Supp. at 149. Likewise, Pervis cannot assert the privilege and maintain his action. Pervis seeks to recover proceeds based on the insurance contract to which he is a party; he must be held to the express terms of the agreement. He is not compelled to incriminate himself. He is, however, bound by the provisions to which he stipulated when he signed the insurance agreement and cannot expect State Farm to perform its obligations under the contract, by being subject to suit for payment of proceeds, without compliance on his part.

To support Pervis' contention that invocation of the privilege has resulted in the automatic entry of summary judgment in favor of State Farm and a complete forfeiture of his rights under the insurance contract, appellant relies upon *United States v. White*, 589 F.2d 1283 (5th Cir.1979), from which he cites a single passage by the court:

> [W]e accept the proposition that a grant of summary judgment merely because of the invocation of the fifth amendment would unduly penalize the employment of the privilege.

Id. at 1287. In *White*, a criminal defendant contended that he was forced to choose between preserving his fifth amendment privilege against self-incrimination and losing a civil lawsuit, in which he was a defendant. The defendant chose to forego silence at the civil trial. The court found that there was no indication that, had defendant remained silent, the case would have resulted in an adverse judgment or a verdict for the plaintiff, even though the defendant might have been denied his most effective defense. The court distinguished the case from instances in which a refusal to submit to interrogation by the State resulted in loss of employment by or opportunity to contract with the State. *Id.* (citing *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967), and *Lefkowitz v. Turley*, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973), *cited in Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976)).

By contrast, Pervis *instituted* this civil suit against State Farm. He chose to seek enforcement of a contract at a time when he had no right of action under that agreement. The entry of summary judgment against Pervis does not subject him to a deprivation of constitutional magnitude. As was stated in *White*:

> The fifth amendment preserves the right to choose, and the voluntariness of the choice is always affected in some way by the exigencies of a particular situation. . . . [D]efendant cannot be free from conflicting concerns, and in any case, defen-

> dant must weight the relative advantages of silence and explanation.

589 F.2d at 1287.

It should be noted that, after refusing State Farm's request to be examined, Pervis testified at his criminal trial and obviously did not see fit to invoke his right to remain silent. Appellant made no offer to submit to an examination under oath at any time during the four months between the completion of his criminal trial and the filing of this lawsuit. Pervis chose between complete silence in response to State Farm's request and maintaining an action against State Farm. *Cf. Town of Newton v. Rumery*, 480 U.S. 386, 394, 107 S.Ct. 1187, 1193, 94 L.Ed.2d 405 (1987) (noting that in some cases, a criminal defendant's choice to enter into an agreement to release civil claims against the government if charges against the defendant are dropped "will reflect a highly rational judgment that the certain benefits of escaping criminal prosecution exceed the speculative benefits of prevailing in a civil action."). State Farm had no obligation to repeat its request for an examination after appellant breached the contract, and appellant's offer to be examined, as expressed on appeal, comes too late to be considered. Under the circumstances of this case, there is no principle that excuses Pervis's refusal to submit to an examination under oath such that he should be permitted to pursue his action against State Farm.

The judgment of the district court is AFFIRMED.

Appendix C

181 Ga.App. 613

PERVIS

v.

THE STATE.

No. 73581.

Court of Appeals of Georgia.

Jan. 8, 1987.

Rehearing Denied Jan. 27, 1987.

Certiorari Denied March 4, 1987.

BANKE, Presiding Judge.

The appellant appeals his conviction of first-degree arson. Prior to the fire, the appellant had been operating a business in the basement of his home known as Dahlonega Sales and Service. The evidence demonstrated that on the morning the fire occurred, his office manager met the secretary in the driveway upon her arrival for work and informed her that appellant wanted her to return home until further notice, explaining that the company's factor was at the house seeking to audit certain accounts and that appellant did not want "to get involved with it on that day." The secretary telephoned the office later that day and was told to take the afternoon off.

The office manager testified that appellant appeared to be extremely nervous and distraught on the day in question.

He further testified that the appellant had confided in him that he was under much pressure because the bank was about to take his home, that he would burn the house to the ground before he would let them have it, and that he could start such a fire by igniting flammable material or letting "the gas line loose on the space heater."

Appellant left the house at 12:40 p.m., before the onset of the fire, and traveled to Gainesville, Georgia, where he spent the afternoon with his wife. When he returned to his home, it was engulfed in flames. *Held:*

1. Appellant contends that the trial court erred in denying his motion in limine seeking to suppress all physical evidence seized during a warrantless, nonconsensual search of the property conducted 19 days after the blaze. That motion was denied by the trial court on the ground that the search lacked sufficient governmental involvement to invoke the safeguards of the Fourth Amendment.

Pretermitting the question of whether the search was conducted solely by a private citizen, thereby affording appellant no Fourth Amendment protections, or whether it was conducted in concert with law enforcement authorities, thus triggering the safeguards of the Fourth Amendment, (see e.g. *Burdeau v. McDowell*, 256 U.S. 465, 41 S.Ct. 574, 75 L.Ed. 1048 (1921); *Lester v. State*, 145 Ga.App. 847(2), 244 S.E.2d 880 (1978)), we conclude that under the facts of this case appellant had no reasonable expectation of privacy in the fire-damaged premises.

The United States Supreme Court recently addressed the issue of whether and to what extent a defendant may assert a privacy interest in fire-damaged property, reaching

the following conclusions: "Privacy expectations will vary with the type of property, the amount of fire damage, the prior and continued use of the premises, and in some cases the owner's efforts to secure it against intruders. Some fires may be so devastating that no reasonable privacy interests remain in the ash and ruins, regardless of the owner's subjective expectations. The test essentially is an objective one: whether 'the expectation [is] one that society is prepared to recognize as "reasonable." ' [Cits.] If reasonable privacy interests remain in the fire-damaged property, the warrant requirement applies, and any official entry must be made pursuant to a warrant in the absence of consent or exigent circumstances." See *Michigan v. Clifford*, 464 U.S. 287, 292, 104 S.Ct. 641, 646, 78 L.Ed.2d. 477 (1984).

The record in the present case reflects that the appellant's home and office were totally consumed by the fire, with only the remnants of a brick chimney left standing. Appellant himself testified that "there was nothing left of the house" and that all of his personal belongings were consumed by the fire. It appears that no effort was made to secure the premises, and there was certainly no evidence of any continued use of the property by the appellant. The items that were seized during the search were simply exhumed from an openly visible pile of ashes and rubble. Under these circumstances, we hold that appellant retained no reasonable objective expectation of privacy in the structure and that the seizure of the evidence in question consequently did not violate his Fourth Amendment rights.

2. Appellant submits that the trial court committed reversible error in denying his pretrial motion to inspect, examine, and test the physical evidence of arson removed

from the site—specifically, a can of debris containing kerosene residue and a segment of a propane line which had been connected to a space heater but which purportedly showed signs of having been deliberately loosened. This evidence had been discovered at the scene of the fire by a Lumpkin County Sheriff's Department investigator but had been removed from the scene by an investigator employed by State Farm Insurance Company, the appellant's fire insurance carrier, at a time when both individuals were there investigating the cause of the fire. The evidence had then been delivered to independent scientific experts employed by State Farm for analysis. When asked why he would turn over such potential evidence of a criminal offense to a private individual, the sheriff's department investigator responded that the State Farm investigator was an expert in fire investigations and had a private lab at his disposal for analysis. The evidence remained in the possession of State Farm until the time of the trial, when it was introduce into evidence by the state.

The state's attorney represented to the trial court that his office had not learned of the existence of the reports prepared by the State Farm experts setting forth the results of their analysis of the items in question until February 17, 1986, and that the reports had been transmitted to appellant's counsel on February 20. Appellant filed his motion to permit independent testing on February 25. That motion was ultimately granted with respect to material in the possession or control of the district attorney but was denied with respect to any material or evidence in possession of private individuals. Since the material at issue was in State Farm's possession, appellant was thus denied access to it

until the time of the trial, which commenced on March 3, 1986.

"A criminal defendant on trial for his liberty is entitled on motion timely made to have an expert of his choosing, bound by appropriate safeguards imposed by the court, examine critical evidence whose nature is subject to varying expert opinion." *Sabel v. State*, 248 Ga. 10, 17, 282 S.E.2d 61 (1981). In the present case, the evidence of arson was unquestionably critical and subject to varying expert opinion. The state contends, however, that *Sabel*, does not compel reversal because the motion for independent analysis was untimely. We disagree. The motion was filed by counsel for the appellant only three business days after he was served by the state with the reports concerning the testing conducted by the State Farm. Moreover, it appears that the state's investigator had by that time been aware of the existence of this evidence for some six months. Under such circumstances, the state will not be heard to complain that appellant was dilatory in filing his motion for independent inspection. Compare *Patterson v. State*, 238 Ga. 204, 232 S.E.2d 233 (1977); *Williams v. State*, 251 Ga. 749(2), 312 S.E.2d 40 (1983). We hold that the appellant's motion to inspect, examine, and test the physical evidence in question was timely and that the denial of the motion violated his due process rights pursuant to *Sabel*, supra. His conviction must consequently be reversed.

3. Appellant's third enumeration of error is rendered moot by our ruling in Division 2.

Judgment reversed.

BIRDSONG, C.J., and SOGNIER, J., concur.

Appendix D

INSURANCE POLICY AT ISSUE

SECTION I - CONDITIONS

1. **Insurable Interest and Limit of Liability.** Even if more than one person has an insurable interest in the property covered, we shall not be liable:

   a. to the **insured** for an amount greater than the **insured's** interest; nor

   b. for more than the applicable limit of liability.

2. **Your Duties After Loss.** In case of a loss to which this insurance may apply, you shall see that the following duties are performed:

   a. give immediate notice to us or our agent, and in case of theft, also the police. In case of loss under the Credit Card coverage also notify the credit card company;

   b. protect the property from further damage or loss, make reasonable and necessary repairs required to protect the property, and keep an accurate record of repair expenditures;

   c. prepare an inventory of damaged or stolen personal property showing in detail, the quantity, description, actual cash value and amount of loss. Attach to the inventory all bills, receipts and related documents that substantiate the figures in the inventory;

d. as often as we reasonably require:

(1) exhibit the damaged property;

(2) provide us with records and documents we request and permit us to make copies; and

(3) submit to examinations under oath and subscribe the same;

e. submit to us, within 60 days after the occurrence, your signed, sworn proof of loss which sets forth, to the best of your knowledge and belief:

(1) the time and cause of loss;

(2) interest of the **insured** and all others in the property involved and all encumbrances on the property;

(3) other insurance which may cover the loss;

(4) changes in title or occupancy of the property during the term of this policy;

(5) specifications of any damaged building and detailed estimates for repair of the damage;

(6) an inventory of damaged or stolen personal property described in 2c;

(7) receipts for additional living expenses incurred and records supporting the fair rental value loss;

(8) evidence or affidavit supporting a claim under the Credit Card, Forgery and Counterfeit

Money coverage, stating the amount and cause of loss.

3. **Loss Settlement.** Covered property losses are settled as follows:

a. Structures that are not buildings and the following personal property:

(1) antiques, fine arts, paintings, statuary and similar articles which by their inherent nature cannot be replaced with new articles;

(2) articles whose age or history contribute substantially to their value including, but not limited to memorabilia, souvenirs and collectors items;

(3) property not useful for its intended purpose

at actual cash value at the time of loss. There may be deduction for depreciation. We will not pay an amount exceeding that necessary to repair or replace.

b. Other personal property and carpeting, domestic appliances, awnings and outdoor antennas whether or not attached to buildings at the cost of repair or replacement without deduction for depreciation, subject to the following:

(1) We will pay the cost of repair or replacement but not exceeding the smallest of the following amounts:

(a) replacement cost at time of loss;

(b) the full cost of repair;

(c) 400% of the actual cash value at the time of loss;

(d) any special limit of liability described in the policy; or

(e) any applicable Coverage A or Coverage B limit of liability.

(2) Loss to property not repaired or replaced within one year after the loss will be settled on an actual cash value basis. This means there may be deduction for depreciation.

c. Buildings under Coverage A at replacement cost without deduction for depreciation, subject to the following:

(1) We will pay the cost of repair or replacement, without deduction for depreciation, but not exceeding the smaller of the following amounts:

(a) the replacement cost of that part of the building damaged for equivalent construction and use on the same premises; or

(b) the amount actually and necessarily spent to repair or replace the damaged building.

(2) We will pay the actual cash value of the damage until actual repair or replacement is completed.

(3) You may disregard the replacement cost loss settlement provisions and make claim under this policy for loss or damage to buildings on an actual cash value basis and then make claim within 180 days after loss for any additional liability on a replacement cost basis.

4. **Loss to a Pair or Set.** In case of loss to a pair or set we may elect to:

a. repair or replace any part to restore the pair or set to its value before the loss; or

b. pay the difference between actual cash value of the property before and after the loss.

5. **Glass Requirement.** Loss for damage to glass caused by a Loss Insured shall be settled on the basis of replacement with safety glazing materials when required by ordinance or law.

6. **Appraisal.** If you and we fail to agree on the amount of loss, either one can demand that the amount of the loss be set by appraisal. If either makes a written demand for appraisal, each shall select a competent, independent appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers shall then select a competent, impartial umpire. If the two appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of a court of record in the state where the **residence premises** is located to select an

umpire. The appraisers shall then set the amount of the loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within a reasonable time, they shall submit their differences to the umpire. Written agreement signed by any two of these three shall set the amount of the loss. Each appraiser shall be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire shall be paid equally by you and us.

7. **Other Insurance.** If a loss covered by this policy is also covered by other insurance, we will pay only the proportion of the loss that the limit of liability that applies under this policy bears to the total amount of insurance covering the loss.

8. **Suit Against Us.** No action shall be brought unless there has been compliance with the policy provisions and the action is started within one year after the occurrence causing loss or damage.

9. **Our Option.** We may repair or replace any part of the property damaged or stolen with equivalent property.

10. **Loss Payment.** We will adjust all losses with you. We will pay you unless some other person is named in the policy or is legally entitled to receive payment. Loss will be payable 60 days after we receive your proof of loss and:

a. reach agreement with you; or

b. there is an entry of a final judgment; or

c. there is a filing of an appraisal award with us.

11. **Abandonment of Property.** We need not accept any property abandoned by any **insured**.

12. **Mortgage Clause.** The word "mortgagee" includes trustee.

If a mortgagee is named in this policy, any loss payable under Coverage A shall be paid to the mortgagee and you, as interests appear. If more than one mortgagee is named, the order of payment shall be the same as the order or precedence or the mortgages.

If we deny your claim, that denial shall not apply to a valid claim of the mortgagee, if the mortgagee:

a. notifies us of any change in ownership, occupancy or substantial change in risk of which the mortgagee is aware;

b. pays any premium due under this policy on demand if you have neglected to pay the premium;

c. submits a signed, sworn statement of loss within 60 days after receiving notice from us of your failure to do so. Policy conditions relating to Appraisal, Suit Against Us and Loss Payment apply to the mortgagee.

If this policy is cancelled by us, the mortgagee shall be notified at least 10 days before the date cancellation takes effect.

If we pay the mortgagee for any loss and deny payment to you:

a. we are subrogated to all the rights of the mortgagee granted under the mortgagee on the property; or

b. at our option, we may pay to the mortgagee the whole principal on the mortgage plus any accrued interest. In this event, we shall receive a full assignment and transfer of the mortgage and all securities held as collateral to the mortgage debt.

Subrogation shall not impair the right of the mortgagee to recover the full amount of the mortgagee's claim.

13. **No Benefit to Bailee.** We will not recognize any assignment or grant any coverage for the benefit of any person or organization holding, storing or transporting property for a fee regardless of any other provision of this policy.

Appendix E

SWIFT, CURRIE, McGHEE & HIERS
Attorneys at Law
771 Spring Street, N.W.
P.O. Box 54247
Atlanta, Georgia 30379
(404) 881-0844

August 28, 1985

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
PERSONAL AND CONFIDENTIAL

Mr. and Mrs. Allan R. Pervis
c/o William A. Wehunt, Esq.
3258-B Henderson Mill Road
Chamblee, Georgia 30341

Re: State Farm Fire and Casualty Company
Insured: Allan R. Pervis, Jr.
Policy No.: 81-21-6116-6
Claim No.: 11-K758-107
Fire Loss of: July 19, 1985
Sworn Statement in Proof of Loss dated August 7, 1985

Dear Mr. and Mrs. Pervis:

This firm has been retained by State Farm Fire and Casualty Company to represent its interest in the claim filed by Allan R. Pervis, Jr. on the above policy by Sworn Statement in Proof of Loss.

The policy provides, in pertinent parts, in Section 1 - CONDITIONS, Paragraph 2, *Your Duties After Loss*, at Subparagraph d, they will:

> as often as we reasonably require: * * *
>
> (2) provide us with records and documents we request and permit us to make copies; and,
>
> (3) submit to examinations under oath and subscribe the same.

Pursuant to that policy provision, I or a member of this firm will conduct examinations under oath of Allan R. Pervis, Jr. and Ann Pervis at the President's Room, North Georgia College Student Center, Dahlonega, Georgia Wednesday, September 11, 1985. We will begin with Mrs. Pervis' examination at 10:00 a.m. (outside the presence of Mr. Pervis), and then follow with the separate examination of Mr. Pervis at approximately 11:30 a.m. Unless I hear from you differently, I will assume that this date, time and place is agreeable with you. If this is not convenient, I would appreciate your calling me immediately so that we can make more convenient arrangements for the examinations.

State Farm Fire and Casualty Company insists upon taking these examinations under oath and no action may be taken on their claim until the examinations have been completed and all documents requested have been produced.

As provided for in the above-quoted policy provision, and because we have reason to believe that this fire was intentionally set by someone, and in order that the amount of the loss might be ascertained by State Farm Fire and Casualty Company, they should bring with them at the time

of the examination under oath the following materials and documents.

1. The original of the insurance policy.

2. Copies of all other insurance policies covering any aspects of this loss, or in the event such policies are not available, they should obtain all pertinent information as to any additional insurance covering any of this loss.

3. Copies of their personal income tax returns for the years 1983 and 1984.

4. Copies of their monthly bank statements, cancelled checks, ledgers or stubs used for recording checks and all working financial records kept by them or on their behalf for the years 1983, 1984 and 1985 through the date of loss including any information which may be in the hands of any accountant, bookkeeper or agent. (In the event they did not keep some or all of their monthly bank statements, these records are kept by their bank and copies can be reproduced, and we will bear any cost in obtaining this information. However, if they do not have their cancelled checks, we request that they do not obtain these from their bank at this time, but only obtain the monthly bank statements.)

5. Any and all books of account or ledgers kept for any business of which they were an owner, part-owner, or partner during the years 1983, 1984 and 1985, copies of monthly bank statements and tax returns filed on behalf of these businesses for the years 1983, 1984 and 1985, including any profit and loss statements or statements of earnings and any other financial information whether or not in the possession of any accountant, bookkeeper or other agent.

6. Copies of all promissory notes to which there was an outstanding balance at the time of the fire which were given, endorsed or guaranteed by them or by any business of which they were an owner, part-owner, or partner, these notes being in addition to and not a limitation on other books of account, ledgers and bank statements previously requested.

7. Any and all mortgages, liens, security interests or other encumbrances on any of your property and any property belonging to any business of which they were an owner, part-owner, or partner during the years 1983, 1984 and 1985.

8. All appraisals of any of the property lost in the fire, whether that appraisal was made before or after the fire.

9. Any and all estimates which they have obtained for the repair or replacement of the items alleged to have been lost in the fire, for both the dwelling and the contents.

10. Any and all other documentation of whatever kind or nature, including receipts, which they have in their possession or which they can obtain in order to verify and substantiate the claim which they have filed for this loss.

As state above, if there is any expense involved in obtaining information from a financial institution, we will advance you the cost of copying or reimburse you for any such expenses at the time of their examination under oath.

Thank you and I look forward to seeing you on Wednesday, September 11, 1985.

With kindest regards,

Yours, very truly,

SWIFT, CURRIE, McGHEE & HIERS

Michael H. Schroder

cc: Walter J. Campbell
Ed Sellers

(2)

No. 90-320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALLAN R. PERVIS,

Petitioner,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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September 14, 1990

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IN THE

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STATE FARM FIRE AND CASUALTY COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

On or about July 19, 1985, a fire occurred at Petitioner's residence which destroyed the dwelling and its contents. Shortly thereafter, Petitioner filed a claim for insurance proceeds pursuant to a homeowner's policy of insurance issued to Petitioner by Respondent State Farm Fire and Casualty Company. Due to the suspicious nature of the fire, an investigation into the fire loss was conducted by Richard Wallace, a State Farm special investigator. State Farm also retained the services of three independent experts to determine the cause and origin of the fire. After a thorough investigation, Mr. Wallace and the three independent experts concluded that the fire was incendiary in origin. Complying with the mandates of Georgia law, State

Farm reported these findings to the State Fire Marshal and agreed to cooperate with law enforcement officials who were conducting their own independent criminal investigation into the fire.

During the course of its investigation, State Farm took recorded statements from Petitioner on July 22, 1985 and again on August 7, 1985. Neither was a sworn statement.

On August 28, 1985, State Farm demanded an examination under oath from Petitioner to take place on September 11, 1985, pursuant to a provision of the policy which provides that in case of a loss to which the insurance may apply, the insured shall submit to examinations under oath and subscribe to same.

On August 29, 1985, a grand jury in Lumpkin County issued an indictment against Petitioner, charging him with arson. Petitioner subsequently refused to submit to any examination under oath, asserting his Fifth Amendment privilege against self-incrimination. On September 4, 1985, State Farm again insisted on its right under the policy to take Petitioner's examination under oath and warned Petitioner's attorney that a failure to comply would be construed as a breach of the policy, thereby voiding coverage. Despite this warning, Petitioner again refused to submit to an examination under oath and, in fact, did not appear on September 11, 1985, at the time and place designated to conduct the scheduled examination.

A trial was scheduled in Lumpkin County on the criminal charges then pending against Petitioner for the first week in March, 1986. Both Mr. Wallace and one of the independent experts were subpoenaed as witnesses for the

State. On March 7, 1986, Petitioner was convicted of first degree arson for which he was sentenced to 40 years in prison and fined $10,000.

On July 17, 1986, while Petitioner was incarcerated, he filed this civil suit seeking $370,000 under the terms of the policy from State Farm plus punitive damages, interest, and attorney's fees. During the four months between his conviction and the filing of his civil suit, Petitioner never offered to submit to an examination under oath.

In a decision reached on January 8, 1987, the Court of Appeals of Georgia reversed the criminal conviction because the trial judge had failed to order the prosecution to provide Petitioner and his attorney a pre-trial opportunity to inspect, examine and test the physical evidence of arson removed from the site. *Pervis v. State*, 181 Ga. App. 613, 353 S.E.2d 200 (1987).

On May 5, 1989, State Farm's Motion for Summary Judgment was granted by the Honorable Marvin Shoob, United States District Judge for the Northern District of Georgia, Atlanta Division. The Court held that the Fifth Amendment privilege against self-incrimination did not excuse Petitioner's refusal to submit to an examination under oath. On May 18, 1990, the United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the District Court. *Pervis v. State Farm Fire and Casualty Co.*, No. 89-8401, slip op. 2679 (11th Cir. May 18, 1990).

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE DECISION BELOW IS IN ACCORD WITH THE DECISIONS OF EVERY OTHER JURISDICTION THAT HAS ADDRESSED THE ISSUE PRESENTED IN THIS CASE.

The Eleventh Circuit correctly ruled that the Fifth Amendment privilege against self-incrimination does not excuse an insured's refusal to submit to an examination under oath. In so holding, the Eleventh Circuit has followed the lead of every other jurisdiction that has addressed the question. *See, e.g., Kisting v. Westchester Fire Ins. Co.*, 416 F.2d 967 (7th Cir. 1969), *aff'g*, 290 F.Supp. 141 (W.D. Wis. 1968). To hold otherwise would set a dangerous precedent. Any individual under a potential threat of criminal charges could pursue an insurance claim and expect the company to pay, yet refuse to provide information vital to the company's investigation into the circumstances surrounding the loss.

In *Kisting*, 290 F.Supp. at 141, the court was faced with circumstances very similar to those presently before this Court. There, the insured refused to answer questions during his examination under oath regarding recent tax returns by invoking the privilege against self-incrimination. The court held that recovery was barred because the plaintiff sought "to utilize the privilege not only as a shield but as a sword." 290 F.Supp. at 149. Likewise, Petitioner cannot hide behind the Fifth Amendment privilege by refusing to submit to an examination under oath while at the same time prosecuting his own claim against State Farm.

Petitioner claims that the decision of the Eleventh Circuit is in conflict with the decisions of this Court, specifi-

cally *Lefkowitz v. Turley*, 414 U.S. 70 (1973) and *United States v. Wade*, 388 U.S. 218 (1967). However, both *Lefkowitz* and *Wade* concluded that the Fifth Amendment protects a person from being compelled by the State to testify against himself and, therefore, these decisions do not apply to a contract dispute between a private individual and a private corporation.

Although Petitioner concedes that State Farm is not an instrumentality of the State, he continues to insist that State Farm was behind his criminal conviction and that he should therefore be excused from the examination under oath requirement. These allegations have no basis in fact and are not supported by law. After a thorough investigation, the State Farm investigator and the three independent experts retained by State Farm reached the conclusion that the fire was incendiary in origin. As required by Georgia law, they reported their findings to the State Fire Marshal and cooperated with law enforcement officials who were conducting their own investigation into the fire. O.C.G.A. § 25-2-33(b). Anything less than full cooperation with the criminal authorities would have been a violation of both the letter and spirit of the law, and State Farm's cooperation with the State does not give Petitioner the right to ignore his duty under the insurance contract to submit to an examination under oath.

Petitioner relies heavily upon dicta in *United States v. White*, 589 F.2d 1283 (5th Cir. 1979), to support his contention that invocation of the Fifth Amendment privilege has resulted in the automatic entry of summary judgment in favor of State Farm and an unconstitutional forfeiture of his rights under the insurance contract. However, the *White*

dicta lends no support whatsoever to Petitioner's position because the facts of that case are dramatically different than those presently before this Court. That case concerned the issue of whether it is unconstitutional to force a criminal defendant to choose between preserving his Fifth Amendment privilege against self-incrimination and losing a civil lawsuit in which he was also a defendant. Since the defendant elected to forego silence at the civil trial, the *White* court focused its inquiry on the issue of whether his "waiver" of the Fifth Amendment privilege was voluntary, noting that there are always conflicting concerns and consequences to be weighed in choosing between silence and explanation. Even though the defendant might have been denied his most effective criminal defense, his choice to waive the privilege was deemed voluntary.

The most important difference between this case and *White* is that Petitioner chose to institute the civil suit against State Farm. Unlike the involuntary civil defendant in *White*, Petitioner's dilemma is entirely self-created. Noting the distinction between an involuntary defendant and a plaintiff in a civil suit, the Georgia Supreme Court in *Savannah Surety Associates, Inc. v. Master*, 240 Ga. 438, 439, 241 S.E.2d 192, 193 (1978) stated:

> What may happen when a plaintiff in a civil case asserts the privilege against self-incrimination therefore would not be the same as when a defendant asserts that same privilege.

Petitioner's complaint in this case is that he has had to suffer the consequences of invoking the privilege in the civil case, an argument that must be viewed with skepticism when it is noted that he took the stand and testified fully at

his criminal trial. Petitioner's motives are further highlighted by the fact that Petitioner never offered to submit to an examination under oath at any time during the four months between his testimony at the criminal trial and the filing of his civil action against State Farm. Under these circumstances, the Eleventh Circuit properly found that the entry of summary judgment against him "[did] not subject him to a deprivation of constitutional magnitude."

The conclusion of the Eleventh Circuit is in accord with prior decisions of this Court where it was noted in *Newton v. Rumery*, 480 U.S. 386, 394 (1987) that "[a]lthough a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." Although Petitioner had an absolute right to invoke his Fifth Amendment privilege, that privilege did not release him from suffering the consequences that arose from his choice of silence instead of explanation. To be sure, a decision to abandon his insurance claim may have been difficult for Petitioner, but that fact alone does not mandate a review by this Court.

II. A FLAT REFUSAL TO MAKE ANY APPEARANCE WHATSOEVER GOES FAR BEYOND ANY PROTECTION THAT MIGHT ARGUABLY BE AFFORDED BY THE FIFTH AMENDMENT.

Even if the Fifth Amendment did create a sufficient excuse for noncompliance with the examination under oath procedure during the pendency of criminal charges against the insured, Petitioner is not in a position to assert the privilege. In *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951), this Court enunciated the standard for measuring when a witness may properly claim his right against self-incrimination:

> To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'

A proper application of this standard implicitly requires that specific questions be propounded by the investigating body, and the claim of the right against self-incrimination must be claimed in response to each. As pointed out by the court in *United States v. Malnik*, 489 F.2d 682, 685 (5th Cir. 1974), *cert. denied*, 419 U.S. 826 (1974), "[a] 'blanket' refusal to answer all questions is unacceptable." In this case, Petitioner could not demonstrate to the court below, nor can he demonstrate to this Court one single question that was asked by State Farm pursuant to the examination under oath requirement that triggered any claimed privilege under the Fifth

Amendment. Instead, Petitioner wants this Court to rule that the privilege excuses an insured from cooperating with the insurance company's investigation any time there is an on-going criminal investigation of the insured, a position that would totally emasculate the purpose of the examination under oath requirement. Such a result would fly in the face of the numerous court decisions recognizing the extreme importance of an examination under oath to the insurance company and, ultimately, to its shareholders and other policyholders. *See, Claflin v. Commonwealth Ins. Co.*, 110 U.S. 81 (1884); *Halcome v. Cincinnati Ins Co.*, 254 Ga. 742, 334 S.E.2d 155 (1985).

Petitioner asserts that his Fifth Amendment and due process rights excuse his failure to submit to an examination under oath until after the conclusion of the criminal proceedings. However, his reliance upon *United States v. Wade*, 388 U.S. at 218, to support that proposition is misplaced. The issue in *Wade* was whether the Fifth Amendment privilege against self-incrimination was violated by compelling a criminal defendant to submit to a line-up. Answering this question in the negative, the Court noted that the privilege only protects an accused from being compelled to testify against himself. *Id.* at 221. However, since an accused's right not to give testimony against himself was not at issue, this Court did not specifically state that the privilege could only be asserted in response to questions actually propounded. To conclude otherwise, however, would contradict this Court's decision in *Hoffman v. United States*, 341 U.S. at 486-87. Therefore, Petitioner's interpretation of *Wade* must fail.

The proposition which Petitioner urges this Court to accept is further undermined by *Hudson Tire Mart, Inc. v.*

Aetna Cas. & Sur. Co., 518 F.2d 671 (2nd Cir. 1975), in which the Second Circuit Court of Appeals was faced with a factual situation similar to the present case. In that case, a May, 1974 fire resulted in a September, 1974 indictment of the owner of the business. The indictment was followed a month later by a notice of examination under oath mailed by the insurance company. The indicted owner refused to appear for his examination under oath, and he moved the court for protection from his appearance, claiming a violation of his due process rights. The court found no violation of due process since the insured had refused to appear for any examination whatsoever. The court noted that, "there are numerous relevant matters with respect to which an insured may be examined without necessarily incriminating himself." *Id.* at 674.

Thus, missing from this case is the essential condition precedent to Petitioner's assertion of his Fifth Amendment privilege against self-incrimination — i.e., allegations or facts demonstrating that he refused to answer specific questions propounded by State Farm for fear of incriminating himself. Rather, the facts of record clearly indicate that Petitioner simply asserted the unacceptable "blanket" refusal to testify. Under these circumstances, no question is presented which warrants the grant of certiorari.

III. AN INSURER'S RIGHT TO INSIST UPON COMPLIANCE WITH THE EXAMINATION UNDER OATH REQUIREMENT PRESENTS NO ISSUE FOR REVIEW BY THIS COURT.

Because Petitioner provided two prior statements to State Farm investigators, he contends that the examination under oath was not "reasonably required" under the policy. In the first place, such a factual argument does not rise to a level of importance that merits this Court's attention. Secondly, acceptance of Petitioner's argument would totally emasculate the purpose the examination under oath was designed to serve since any individual could arbitrarily decide that he had provided enough information to enable the insurance company to make a decision on his claim. The examination under oath procedure affords the insurance company the opportunity to thoroughly question the insured and the insured's agents about the details of the loss, and the insurance company is not required to admit or deny liability for the loss until that critical part of the investigation has been concluded. The importance to the insurance company of the examination under oath cannot be overestimated, and the courts have always given great deference to the right of the insurance company to broadly examine its insured before liability may be imposed. *Claflin v. Commonwealth Ins. Co.*, 110 U.S. at 81.

The Georgia Supreme Court recently addressed the importance to an insurance company of conducting a thorough examination under oath as part of its investigation. In *Halcome v. Cincinnati Ins. Co.*, 254 Ga. at 742, the Georgia Supreme Court, in answering a certified question from the Eleventh Circuit Court of Appeals, faced the issue of

whether an insured's refusal to provide information regarding his income during examination under oath breached the insurance contract, thereby barring recovery. In finding a breach of the insured's duty of cooperation, the court stated, "if the Halcomes fail to provide any material information called for under . . . the policy, they breach the insurance contract." *Id.* at 744.

Applying the rationale of the *Halcome* court to the present set of facts, it becomes clear that Petitioner would have breached his contract with State Farm if he failed to provide one item of material information during an examination under oath. The breach involved here is much greater, however, since Petitioner completely refused to answer *any* questions under oath. The policy provides that no action shall be brought unless there has been compliance with all the policy provisions, including the requirement that the claimant submit to examinations under oath and subscribe to same. No matter how much unsworn information Petitioner conveyed to State Farm's investigators, the policy entitled State Farm to insist upon an examination under oath and Petitioner refused to comply. Therefore, Petitioner did not satisfy his obligations under the policy and his case was properly dismissed.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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